No. 88-1512

FILED
JUN 29
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,

Petitioners,

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

Stanley V. Ostrom, Esq.
Richard B. Tucker, III, Esq. *
William A. Pennuto, Esq.
Tucker Arensberg, P.C.
1200 Pittsburgh National Building
Pittsburgh, PA 15222
(412) 566-1212

Counsel for Petitioners, Albert J. Ferens and Margaret L. Ferens, his wife

David P. Helwig, Esq. *
Gary F. Seablock, Esq.
Seablock, Reposkick & Magler
1100 Two Chatham Center
Pittsburgh, PA 15219
(412) 391-6171

Counsel for Respondent, John Deere Company, a/k/a Deere & Company

*Counsel of Record

Petition For Certiorari Filed March 15, 1989
Certiorari Granted May 15, 1989

TABLE OF CONTENTS

Page

Relevant Docket Entries

District Court (Civil Action No. 85-1534) 1

District Court (Civil Action No. 85-2725) 3

Court of Appeals 6

Pleadings, Orders and Opinions *

Complaint in Civil Action No. 85-1534 8

Complaint in Civil Action No. 85-2725 (No. J85-733 (B) in the Southern District of Mississippi) 13

Answer 20

Motion For Change Of Venue (without exhibits) 26

Affidavit In Support Of Motion For Change Of Venue 31

Order Changing Venue 34

Motion For Consolidation Of Actions 36

Order Consolidating Actions 39

Motion For Summary Judgment 40

Opinion Of The District Court (reproduced as Appendix D to Petitioners' Petition For A Writ Of Certiorari) ..... Petition, App. D, A-34

---

* Except for the Complaint filed in Civil Action No. 85-1534, all of the District Court pleadings, orders and opinions contained in this Joint Appendix were filed with respect to Civil Action No. 85-2725 (No. J85-733 (B) in the Southern District of Mississippi) or with respect to both Civil Action No. 85-2725 and Civil Action No. 85-1534.

TABLE OF CONTENTS – Continued

Page

Order Re Summary Judgment 43

Motion For Certification And Final Judgment Pursuant To Rule 54(b) And Request For Stay And Extension Of Time To Appeal 45

Order Directing Entry Of Final Judgment, Extending Time To Appeal And Staying Further Proceedings 49

Notice Of Appeal 51

Opinion Of The Court Of Appeals Dated May 28, 1987 (reproduced as Appendix C to Petitioners' Petition For A Writ Of Certiorari) ..... Petition, App. C, A-18

Order Of The Supreme Court Of The United States Vacating The Judgment Of The Court Of Appeals (reproduced as Appendix B to Petitioners' Petition For A Writ Of Certiorari) ..... Petition, App. B, A-17

Opinion Of The Court Of Appeals Dated November 25, 1988 (reproduced as Appendix A to Petitioners' Petition For A Writ Of Certiorari) ..... Petition, App. A, A-1

Judgment Of The Court Of Appeals Dated November 25, 1988 (reproduced as Appendix E to Petitioners' Petition For A Writ Of Certiorari) ..... Petition, App. E, A-50

Order Of The Court Of Appeals Sur Petition For Rehearing (reproduced as Appendix F to Petitioners' Petition For A Writ Of Certiorari) ..... Petition, App. F, A-52

TABLE OF CONTENTS – Continued

Page

The Judgment In Question

Judgment Of The United States Court Of Appeals For The Third Circuit Dated November 25, 1988 (reproduced as Appendix E to Petitioners' Petition For A Writ Of Certiorari) ..... Petition, App. E, A-50

RELEVANT DOCKET ENTRIES AT CIVIL ACTION NO. 85-1534 IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Date	
1985	
July 3	Complaint filed.
Aug. 5	Answer filed by defendant.
Aug. 29	Reply to answer and/or affirmative defenses filed by plaintiffs.
Nov. 21	Plaintiffs' motion for consolidation of actions filed with a proposed order.
Nov. 21	Order entered directing that the action of Albert Ferens, et ux. v. John Deere Co. a/k/a Deere & Co. at C.A. 85-2725 be and hereby is consolidated with C.A. 85-1534 for all purposes. (Cohill, J.)
1986	
Feb. 20	Deere & Company's motion for summary judgment filed with a proposed order.
July 25	Opinion filed and order entered directing that defendant's motion for summary judgment be and hereby is denied with respect to the claims brought by C.A. 85-1534; defendant's motion for summary judgment be and hereby is granted with respect to the claims brought by C.A. 85-2725. (Cohill, J.)
Aug. 20	Motion for certification and final judgment upon less than all claims pursuant to Rule

54(b) and request for stay of further proceedings and extension of time to appeal filed by plaintiffs with a proposed order.

Sept. 5 Order entered directing that as to the summary judgment at C.A. 85-2725 there is no just reason for delay and therefore entry of final judgment is directed; an extension of 30 days is hereby granted to plaintiffs to file an appeal on the within final judgment; a stay of further proceedings is granted upon C.A. 85-1534 until such time as the issue on appeal is resolved. (Cohill, J.)

RELEVANT DOCKET ENTRIES AT CIVIL ACTION NO. 85-2725 IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (TRANSFERRED FROM THE SOUTHERN DISTRICT OF MISSISSIPPI)

Date	
1985	
Nov. 15	The following papers were received from the Southern District of Mississippi and filed:
	Complaint filed with request for jury trial. (filed 7/25/85)
	Answer of defendant filed with jury trial request. (filed 9/27/85)
	Plaintiff's motion for change of venue filed. (filed 10/2/85)
	Affidavit of Albert J. Ferens filed. (filed 10/2/85)
	Hearing on 10/24/85 before Magistrate Countiss on plaintiff's motion for change of venue; action taken: granted – cause will be transferred. (filed 10/25/85)
	Order changing venue. Plaintiff's motion for change of venue is granted and it is ordered that this cause is transferred to the U.S. District Court, Western District of Pennsylvania for the convenience of the parties and witnesses; further ordered that the Clerk effectuate the transfer according to law.
Nov. 21	Plaintiffs' motion for consolidation of actions filed with a proposed order.

Nov. 21 Order entered directing that the action of Albert Ferens, et ux. v. John Deere Co. a/k/a Deere & Co. at C.A. 85-2725 be and hereby is consolidated with Albert Ferens, et ux. v. Deere & Co. at C.A. 85-1534 for all purposes. (Cohill, J.)

1986

Feb. 20 Deere & Company's motion for summary judgment filed with a proposed order.

July 25 Opinion filed and order entered directing that defendant's motion for summary judgment be and hereby is denied with respect to the claims brought by C.A. 85-1534; defendant's motion for summary judgment be and hereby is granted with respect to the claims brought by C.A. 85-2725. (Cohill, J.)

Aug. 20 Motion for certification and final judgment upon less than all claims pursuant to Rule 54(b) and request for stay of further proceedings and extension of time to appeal filed by plaintiffs with a proposed order.

Sept. 5 Order entered directing that as to the summary judgment at C.A. 85-2725 there is no just reason for delay and therefore entry of final judgment is directed; an extension of 30 days is hereby granted to plaintiffs to file an appeal on the within final judgment; a stay of further proceedings is granted upon C.A.

85-1534 until such time as the issue on appeal is resolved. (Cohill, J.)

Oct. 2 Notice of appeal filed from order dated 9/5/86.

RELEVANT DOCKET ENTRIES AT No. 86-3595
IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Date	
1986	
Oct. 7	Appeal docketed.
1987	
May 28	Opinion filed and judgment entered affirming the judgment of the District Court.
June 22	Petition for rehearing and rehearing en banc filed.
July 9	Order denying the petition for rehearing filed.
1988	
June 29	Copy of the Supreme Court letter dated 6/27/88 stating that petition for certiorari is granted, the judgment is vacated and the case is remanded for further consideration received.
Aug. 8	Copy of the Supreme Court judgment dated 6/27/88 vacating the judgment of the Third Circuit and remanding for further consideration filed.

Nov. 25	Opinion filed and judgment entered on remand from the Supreme Court of the United States affirming the judgment of the District Court.
Dec. 9	Petition for rehearing and rehearing en banc filed.
1989	
Jan. 5	Order denying the petition for rehearing filed.
May 17	Certified copy of order granting certiorari on May 15, 1989 in the Supreme Court filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife,	)	Civil Action No. 85-1534
Plaintiffs,	)	JURY TRIAL DEMANDED
vs.	)	
DEERE & COMPANY,	)	
Defendant.	)	

COMPLAINT

AND NOW, comes ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs, by and through their counsel, Finkel Lefkowitz Ostrow & Woolridge, and hereby claims damages of DEERE & COMPANY, upon the following causes of action:

1. The plaintiffs are husband and wife and reside in the County of Washington and Commonwealth of Pennsylvania.

2. The defendant, Deere & Company (hereinafter "Deere") is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office at John Deere Road, Moline, Illinois 61265, and regularly doing business in the Commonwealth of Pennsylvania and County of Allegheny.

3. The parties hereto being citizens of different states and the amount in controversy exceeding the sum

of $10,000.00 exclusive of interest and costs, jurisdiction is therefore invoked pursuant to 28 U.S.C. §1332.

4. On or about July 17, 1981 husband-plaintiff purchased a John Deere Sidehill #6620 Combine, Serial No. 454097 (hereinafter "Combine").

5. The aforesaid Combine was manufactured by defendant, Deere, who was in the business of manufacturing, advertising, selling and distributing combines.

6. Defendant Deere sold the combine in question to Uniontown Farm Equipment Company in Uniontown, Pennsylvania, which company hereafter sold the combine to plaintiff for use on his farm.

7. On or about July 5, 1982, while plaintiff was cleaning the Combine, his hand was pulled into the rotating auger, thereby traumatically amputating his right hand above the wrist.

COUNT I

Albert J. Ferens vs. *Deere & Company*

8. Paragraphs 1 through 7 of this Complaint, by reference hereto, are made a part of this Count I as though specifically pleaded.

9. Solely as a result of the aforesaid injuries, the plaintiff has sustained the following damages:

(a) Traumatic amputation of his right hand above the wrist, with consequent disfiguring scars;

(b) He has incurred and will in the future continue to incur expenses for doctor bills, hospital bills, medicines, prosthesis, and other incidentals;

(c) He has undergone and in the future will continue to undergo great mental and physical pain and suffering, inconvenience and embarrassment;

(d) His earning power has been impaired and in the future will be permanently impaired;

(e) He has suffered and in the future will continue to suffer severe loss of earnings and profits;

(f) He has been and in the future will continue to be deprived of the ordinary pleasures of life.

10. The said combine was expressly and/or impliedly warranted by defendant to be merchantable and fit for the ordinary purposes for which it was used as more specifically stated in 13 Pa.C.S. 2312 and 2313.

11. The aforesaid combine was not merchantable and not fit for the ordinary purposes for which it was used by reason of being designed and manufactured defectively.

12. The Defendant Deere breached its expressed and/or implied warranties in the following particular manner:

(a) In manufacturing, advertising, selling and/or distributing the Combine assembled in a defective manner with a defectively designed clean-out door, and unfit for the purpose for which it was intended to be used and for which it was used;

(b) In manufacturing, advertising, selling and/or distributing the Combine which defendant, Deere, expressly and/or impliedly warranted was free of all defects, which in fact was not free of defects.

(c) In manufacturing, advertising, selling and/or distributing the Combine which did not conform with normal commercial standards in the trade in which defendant Deere was engaged;

(e) In that defendant Deere knew or should have known that the aforesaid Combine was inadequate for the purpose intended;

(f) In expressly and/or impliedly warranting and representing to plaintiff that said defective Combine which was sold to plaintiff was fit for purposes for which it was supplied when same was not so fit.

14. As a direct and proximate cause of the defendant's Deere's breach of warranties as above described, Plaintiff has sustained injuries and damages as set forth in Paragraph 9 of this Complaint which are incorporated herein by reference.

WHEREFORE, Plaintiff claims of defendant, Deere & Company, appropriate damages and demands that this case by tried by a jury.

COUNT II

Margaret L. Ferens v. Deere & Company

15. Paragraphs 1 through 14 of this Complaint are hereby incorporated by reference as if set forth verbatim.

16. That, further as a direct and proximate result of the breach of warranties as hereinabove more fully set forth, the wife-plaintiff has in the past lost the love, society, companionship, affection, and consortium of her husband, the Plaintiff, Albert J. Ferens, all of which may continue for an indefinite period of time in the future.

WHEREFORE, plaintiff claims of defendant, Deere & Company, appropriate damages and demand this case be tried by a jury.

FINKEL LEFKOWITZ OSTROW & WOOLRIDGE

/s/ Stanley V. Ostrow

/s/ William A. Penrod
Attorneys for Plaintiffs

800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	Civil Action No. J85-733(B)
vs.	)	JURY TRIAL DEMANDED
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	)	

COMPLAINT

AND NOW, come ALBERT J. FERENS, and MARGARET L. FERENS, his wife, Plaintiffs, by and through their counsel, William W. Barnett, Esquire, and Finkel Lefkowitz Ostrow & Woolridge, and hereby claim damages of JOHN DEERE COMPANY a/k/a DEERE & COMPANY, Defendant, upon the following causes of action:

1. The plainiff is an individual who resides at R.D. #1, Dunbar, Fayette County, and Commonwealth of Pennsylvania.

2. The defendant, John Deere Company a/k/a Deere & Company (hereinafter "Deere") is a corporation organized and existing under and by virtue of the laws of the State of Delaware, is registered with the Secretary of State of Mississippi, is trading and doing business in said State, and maintains a registered office in care of C. T. Corporation System, 118 North Congress Street, Jackson, Mississippi 39201.

3. The parties hereto being citizens of different states and the amount in controversy exceeding the sum of $10,000.00 exclusive of interest and costs, jurisdiction is therefore invoked pursuant to 28 U.S.C. §1332.

4. On or about July 17, 1981, plaintiff purchased a John Deere Sidehill #6620 combine, Serial No. 454907 (hereinafter "Combine").

5. The aforesaid Combine was manufactured by defendant, Deere, who was in the business of manufacturing, advertising, selling and distributing combines.

6. Defendant Deere sold the combine in question to Uniontown Farm Equipment Company, which company thereafter sold the combine to plaintiff for use on his farm.

7. On or about July 5, 1982, while plaintiff was cleaning the Combine, his hand was pulled into the rotating auger, thereby traumatically amputating his hand above the wrist.

8. Solely as a result of the aforesaid injuries, the plaintiff has sustained the following damages:

(a) Traumatic amputation of his hand above the wrist, with consequent disfiguring scars;

(b) He has incurred and will in the future continue to incur expenses for doctor bills, hospital bills, medicines protheses and other incidentals;

(c) He has undergone and in the future will continue to undergo great mental and physical pain and suffering, inconvenience and embarrassment;

(d) His earning power has been impaired and in the future will be permanently impaired;

(e) He has suffered and in the future will continue to suffer severe loss of earnings;

(f) He has been and in the future will continue to be deprived of the ordinary pleasures of life.

COUNT I

Albert J. Ferens v. Deere

9. Paragraphs 1 through 8 of this Complaint are incorporated herein by reference as if set forth verbatim.

10. The aforesaid accident and all the resultant injuries, damages and losses consequent thereto are the proximate result of the carelessness, recklessness and negligence of defendant Deere its agents, servants and employees in the following respects:

(a) In negligently failing to properly design the combine when the defendant knew or should have known the consequence of their failing to do so;

(b) In negligently failing to properly manufacture the combine when the defendant knew or should have known of the consequence of their failing to do so;

(c) In negligently failing to properly inspect the combine prior to its sale and distribution when the defendant knew or should have known of the condition of the combine and then in the absence of such inspection, negligently representing the combine was safe;

(d) In negligently failing to properly warn plaintiff of dangerous condition of combine.

(e) In negligently failing to limit and/or reduce the size of the cleanout door;

(f) In negligently failing to properly manufacture the combine to adequately clean out the sump area;

(g) In negligently failing to specifically and scientifically test the combine, then in the absence of such tests, negligently representing that the combine was safe;

(h) In negligently manufacturing, advertising, selling and distributing said combine without giving any warnings of its defective condition which was known or should have been known to the defendant Deere.

(i) In negligently failing to exercise the standard of care that the laws, customs and codes of the industry and circumstances then required;

(j) In otherwise failing to exercise the due care and caution required under the circumstances;

(k) In failing to exercise reasonable care to discover the defective condition of the combine;

(l) In violating the statutes and regulations of the United States Government, and the laws and regulations of the State of Mississippi.

11. As a direct and proximate cause of defendant Deere's negligence, as described above, plaintiff has sustained injuries and damages as set forth in Paragraphs 7 and 8 of this Complaint which are incorporated herein be reference.

COUNT II –
Albert J. Ferens v. Deere

12. Paragraphs 1 through 11 of this Complaint are incorporated hereby by reference as if set forth verbatim.

13. Defendant Deere know or should have known that that combine would and did reach and would be used by the ultimate user or consumer plaintiff without substantial change in the condition in which it was sold and without inspection for defects.

14. As a result of the above-described defects plaintiff has sustained injuries and damages as set forth in Paragraphs 7 and 8 of this Complaint, which are incorporated herein by reference.

15. The defendant Deere is liable in damages to the plaintiff for violation of the law as incorporated in §402A of the *Restatement of Torts, 2d* in manufacturing and selling a dangerously defective Sidehill Combine.

WHEREFORE, ALBERT J. FERENS, plaintiff, claims of defendant, DEERE & COMPANY, damages in excess of Ten Thousand ($10,000.00) Dollars.

COUNT III
Albert J. Ferens v. Deere

16. Paragraphs 1 through 15 of this Complaint are incorporated herein by reference as if set forth in full.

17. The defendant Deere is liable in damages to the plaintiff for violation of the laws as incorporated in §402B

of the *Restatement of Torts, 2d* for failure to provide adequate warnings of possible risks and inherent or latent limitations of the Combine.

WHEREFORE, ALBERT J. FERENS, plaintiff, claims of defendant Deere & Company damages in excess of Ten Thousand ($10,000.00) Dollars.

COUNT IV

Margaret L. Ferens v. Deere

18. Paragraphs 1 through 17 are incorporated herein by reference as if set forth verbatim.

19. As a direct and proximate result of the aforesaid acts of the defendant Deere its agents, servants and employees, plaintiff, Margaret L. Ferens, has in the past lost the love, society, companionship, affection, services and consortium of her husband, the plaintiff Albert J. Ferens, all of which may continue for an indefinite period of time in the future.

WHEREFORE, MARGARET L. FERENS, plaintiff, claims of defendant DEERE & COMPANY, damages in excess of Ten Thousand ($10,000.00) Dollars.

BARNETT AND JAMES

/s/ William R. Barnett
William R. Barnett

/s/ Faye Murphree James
Faye Murphree James

223 South State Street
Jackson, MI 39201
(601) 354-8627

FINKEL LEFKOWITZ OSTROW & WOOLRIDGE

/s/ Stanley V. Ostrow
Stanley V. Ostrow

/s/ William A. Penrod
William A. Penrod

Attorneys for Plaintiffs
800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ALBERT J. FERENS and
MARGARET L. FERENS, his wife — PLAINTIFFS

V. — CIVIL ACTION NO. J85-733(B)

JOHN DEERE COMPANY — DEFENDANT

ANSWER BY JOHN DEERE COMPANY

JURY TRIAL REQUESTED

Comes now John Deere Company (herein at times referred to as "John Deere"), by and through its undersigned counsel of record, and for its Answer and response to the Complaint filed in this cause on or about July 25, 1985, states as follows:

FIRST DEFENSE

Failure to State a Claim

John Deere avers that the Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Paragraph by Paragraph Answer

Responding paragraph by paragraph to the Complaint, John Deere makes the following admissions, denials and averments:

1.

On information and belief, John Deere admits the allegations in paragraph 1.

2.

John Deere Company admits that it is a corporation organized and existing under and by virtue of the laws of the State of Delaware, that said corporation is registered with the Secretary of State of the State of Mississippi, that it is doing business in the State of Mississippi and that it maintains, as its registered agent, C T Corporation System, 118 North Congress Street, Jackson, Mississippi 39201. John Deere denies all allegations set forth in paragraph 2 except those expressly admitted herein.

3.

John Deere denies that the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs. John Deere admits the remaining allegations set forth in paragraph 3.

4.

John Deere admits the allegations set forth in paragraph 4.

5.

John Deere admits that it is in the business of advertising, selling and distributing combines. John Deere denies the remaining allegations set forth in paragraph 5.

6.

John Deere admits that it sold the combine in question to Uniontown Farm Equipment Company, which company thereafter sold the combine to Plaintiff for use on his farm. Except as expresly admitted herein, the Defendant denies the remaining allegations set forth in paragraph 6.

7.

After reasonable investigation, John Deere is without information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraph 7, and consequently denies said allegations.

8.

After reasonable investigation, John Deere is without information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraph 8, and consequently denies said allegations.

9.

For its response to paragraph 9, John Deere adopts and reasserts all admissions, denials and allegations set forth in paragraphs 1 through 8 above.

10.

John Deere denies the allegations set forth in paragraph 10.

11.

John Deere denies the allegations and averments set forth in paragraph 11. By way of further response, John Deere incorporates herein its response to paragraphs 7 and 8 of the Complaint.

12.

For its response to paragraph 12, John Deere adopts and reasserts all admissions, denials and allegations set forth in paragraphs 1 through 11 above.

13.

John Deere is without information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraph 13, and consequently denies said allegations.

14.

John Deere denies the allegations set forth in paragraph 14.

15.

John Deere denies the allegations set forth in paragraph 15. John Deere denies that the Plaintiff is entitled to the damages set forth in the unnumbered paragraph following paragraph 15 at page 5 of the Complaint, or any relief whatsoever.

16.

For its response to paragraph 16, John Deere adopts and reasserts all admissions, denials and allegations set forth in paragraphs 1 through 15 above.

17.

John Deere denies the allegations set forth in paragraph 17. John Deere denies that the Plaintiff is entitled to the relief requested in the unnumbered paragraph following paragraph 17 and appearing at page 6 of the Complaint, or any relief whatsoever.

18.

For its response to paragraph 18, John Deere adopts and reasserts all admissions, denials and allegations set forth in paragraphs 1 through 17 above.

19.

John Deere denies the allegations set forth in paragraph 19. John Deere denies that the Plaintiff is entitled to the relief requested in the unnumbered paragraph following paragraph 19 and appearing at pages 6 and 7, or any relief whatsoever.

THIRD DEFENSE

Statutes of Limitation

John Deere pleads all applicable statutes of limitation.

FOURTH DEFENSE

Contributory Negligence

John Deere pleads contributory negligence as a bar to part, or all, of the Plaintiffs' recovery in this action.

FIFTH DEFENSE

Assumption of the Risk

John Deere pleads assumption of the risk as a bar to the Plaintiffs' recovery in this action.

SIXTH DEFENSE

Misuse

John Deere pleads misuse as a bar to the Plaintiffs' recovery in this action.

SEVENTH DEFENSE

The Plaintiffs' claim is barred by the applicable terms of the purchase order for the Combine which is the subject of this action.

AND NOW HAVING ANSWERED FULLY, the Defendant prays that this civil action be dismissed with prejudice.

Respectfully submitted,

JOHN DEERE COMPANY

By and through its attorneys:

THOMPSON, ALEXANDER & CREWS
118 North Congress Street
Post Office Box 410
Jackson, Mississippi 39205
Telephone (601) 948-4831

/s/ Frank M. Holbrook
Frank M. Holbrook

[Certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ALBERT J. FERENS and MARGARET L. FERENS, his wife,	)	
Plaintiffs,	)	
vs.	)	Civil Action No.
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY,	)	J85-0733 (B)
Defendant.	)	

MOTION FOR CHANGE OF VENUE

AND NOW come Plaintiffs, Albert J. Ferens and Margaret L. Ferens, his wife, by and through their attorneys, Barnett and James and Finkel Lefkowitz Ostrow & Woolridge, and move this Court to transfer this action to the United States District Court for the Western District of Pennsylvania, pursuant to Section 1404(a), Title 28 of the United States Code, for the convenience of the parties and witnesses and in the interest of justice as more clearly appears in the Affidavit of Albert J. Ferens, and upon the following grounds:

1. Plaintiffs are individuals who reside in Fayette County, Pennsylvania, Western District of Pennsylvania.

2. The basis of Plaintiffs' Complaint against Defendant arises out of a product liability action, wherein Plaintiffs' allege severe personal injuries in an accident which occurred in the Western District of Pennsylvania. Plaintiffs' claim does not arise out of or have any connection with any acts by the Plaintiffs or Defendant or facts or circumstances arising in this State and this District.

3. Defendant is a Delaware corporation with its principal place of business at John Deere Road, Moline, Illinois and is doing business in the Commonwealth of Pennsylvania and Western District of Pennsylvania.

4. There is pending in the United States District Court for the Western District of Pennsylvania an action filed by the Plaintiffs against Defendant at Civil Action No. 85-1534. Said suit was filed on or about July 3, 1985, and a true and correct copy of the Complaint filed in said suit is attached to the Affidavit of Albert J. Ferens, incorporated herein by reference and marked Exhibit "A" to said Affidavit.

5. The basis of the suit filed in the Western District of Pennsylvania is civil action against the same Defendant for damages under the Uniform Commercial Code and which arises out of the same facts and circumstances upon which the within action is based; namely, plaintiff's loss of his h·.d in the operation of a John Deere Sidehill Combine ·n or about July 5, 1982, on husband-plaintiff's farm in ' ennsylvania.

6. The suit filed in the Western District of Pennsylvania against Defendant and the instant action against Defendant contain common questions of fact and law relating to the accident and defendant's product which was involved in said accident.

7. Defendant, in the Pennsylvania action, has already entered its appearance and is actively pursuing discovery in the form of interrogatories and a deposition. True and correct copies of Pennsylvania counsel's Interrogatories and Deposition Notice are attached hereto,

made a part hereof and marked Exhibits "B" and "C" respectively.

8. Because of said common questions of fact and law and with discovery already initiated in Pennsylvania, the feasibility of consolidation of the two actions is great if the instant action were transferred to the Western District of Pennsylvania and the convenience of the parties would be greatly served by eliminating duplicate time and expense in trying the cases in two jurisdictions.

9. Transfer of the instant action to the Western District of Pennsylvania would also save judicial time and effort and insure that all rights are adjudicated at one time without the likelihood of inconsistent verdicts.

10. A substantial number of witnesses, whose testimony will be material and necessary on the claims and defenses, will be the same in each action and said witnesses reside in or are located within the jurisdiction of the District Court for the Western District of Pennsylvania as follows:

(a) Mr./Mrs. Albert J. Ferens
R. D. #1
Dunbar, PA 15431

(b) William H. White, M.D.
Richard G. Katz, M.D.
3500 Fifth Avenue
Pittsburgh, PA 15213

(c) Mark S. Granick, M.D.
4815 Liberty Avenue
Pittsburgh, PA 15224

(d) William M. Swartz, M.D.
3550 Terrace Street
Pittsburgh, PA 15213

(e) Robert Junk
Smock, PA 15480

11. A substantial amount of documentary records are also located within the jurisdiction of the United States District Court for the Western District of Pennsylvania as follows:

(a) Hospital Records of:
Presbyterian-University Hospital of Pittsburgh
DeSoto at O'Hara
Pittsburgh, PA 15213

(b) Medical Records of:
Connelsville State General Hospital
East Murphy Avenue
Connelsville, PA 15425

(c) Records of:
Office of Vocational Rehabilitation
75 East Maiden Street
Washington, PA 15301

12. To require plaintiff to pursue two separate actions involving common questions of fact and law at

the same time and in Pennsylvania and Mississippi would place an unreasonable burden on Plaintiff.

WHEREFORE, Plaintiff respectfully requests that this Court transfer the instant action to the United States District Court for the Western District of Pennsylvania.

BARNETT AND JAMES

/s/ Faye Murphree James
Faye Murphree James

223 South State Street
Jackson, MI 39201
(601) 354-8627

FINKEL LEFKOWITZ
OSTROW & WOOLRIDGE

/s/ Stanley V. Ostrow
Stanley V. Ostrow

/s/ William A. Penrod
William A. Penrod

800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670

Attorneys for Plaintiffs

[Notice, exhibits and certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
vs.	)	Civil Action No.
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	)	J 85-0733

AFFIDAVIT IN SUPPORT OF MOTION FOR CHANGE OF VENUE

COMMONWEALTH OF PENNSYLVANIA	)	
	)	SS:
COUNTY OF ALLEGHENY	)	

Before me, the undersigned authority, personally appeared Albert J. Ferens, who after being duly sworn according to law did depose and state that:

1. He is a resident of Fayette County, Pennsylvania and Western District of Pennsylvania, and that the facts contained herein are true and correct according to his personal knowledge.

2. He directed his counsel to file Complaints at Civil Action No. 85-1534 in the Western District of Pennsylvania and at Civil Action No. J85-0733 in the Southern District of Mississippi.

3. He is now directing his counsel to remove the said Complaint at Civil Action No. J85-0733 in the Southern District of Mississippi to the Western District of Pennsylvania for the convenience of the parties and witnesses

and in the interest of justice for the reasons set forth in the attached Motion.

4. That the John Deere Sidehill #6620 Combine, Serial No. 454097 was purchased on or about July 17, 1981 in Washington County, Pennsylvania, and is presently located on plaintiff's farm in Fayette County.

5. That an accident occurred on July 5, 1982, in Washington County, Pennsylvania while he was cleaning said Combine and his right hand was traumatically amputated above the wrist.

6. The action against defendant, Deere & Company, in the Western District of Pennsylvania arises out of said accident which occurred on July 5, 1982, and is based on provisions of the Uniform Commercial Code.

7. The basis of the action filed against Defendant in the Southern District of Mississippi was the aforesaid July 5, 1982 accident and is based on strict liability, negligence and breach of warranty by said defendant.

8. That all witnesses with any knowledge of the accident or injuries husband-plaintiff sustained, including doctors, hospital personnel and who plaintiffs will call and use, reside in the Western District of Pennsylvania.

9. That all documents relating to the personal injuries plaintiff sustained are located in the Western District of Pennsylvania.

10. That to simultaneously pursue the Pennsylvania and Mississippi actions as separate lawsuits would be a great cost and expense to him.

11. That the averments of fact as set forth in this Affidavit and Motion to which it is attached are true and correct to the best of affiant's knowledge, information and belief.

/s/ Albert J. Ferens
Albert J. Ferens

SWORN to and subscribed before me
this 20th day of August 1985.

/s/ Theresa A. Griffin
Notary Public

THERESA A. GRIFFIN, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES APRIL 24, 1989
Member, Pennsylvania Association of Notaries

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ALBERT J. FERENS and
MARGARET L. FERENS, his wife PLAINTIFFS

V. CIVIL ACTION NO. J85-733(B)

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY DEFENDANT

ORDER CHANGING VENUE

THIS CAUSE came on for hearing of the Motion for Change of Venue filed herein by the Plaintiffs, Albert J. Ferens and Margaret L. Ferens, and the Court, having heard argument of counsel for all parties, finds that said motion should be sustained.

IT IS, THEREFORE, ORDERED AND ADJUDGED that this cause be, and it hereby is, transferred to the United States District Court for the Western District of Pennsylvania pursuant to Section 1404(a), Title 28 of the United States Code, for the convenience of the parties and witnesses.

IT IS FURTHER, ORDERED AND ADJUDGED that the Clerk of this Court effectuate the transfer according to law.

ORDERED AND ADJUDGED, this the 8 day of November, 1985.

/s/ John R. Countiss III
JOHN R. COUNTISS, III
UNITED STATES
MAGISTRATE

APPROVED AS TO FORM:

/s/ William R. Barnett
ATTORNEY FOR PLAINTIFFS

/s/ Frank M. Holbrook
ATTORNEY FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
vs.	)	Civil Action No. 85-1534
DEERE & COMPANY, Defendant.	)	
ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
vs.	)	Civil Action No. 85-2725
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	)	

PLAINTIFFS' MOTION FOR CONSOLIDATION OF ACTIONS

AND NOW comes Finkel Lefkowitz Ostrow & Woolridge, attorneys for plaintiffs in the above-captioned cases and herewith files the following Motion for Consolidation of Actions for the reasons hereinafter set forth:

1. The above-captioned cases are actions for damages arising out of an accident which occurred on June 22, 1982, in Fayette County, Pennsylvania, wherein husband-plaintiff received serious personal injuries while working about a John Deere Combine previously purchased by husband-plaintiff.

2. Plaintiffs filed suit against defendant in the United States District Court for the Western District of

Pennsylvania at Civil Action No. 85-1534 for damages due to breach of warranties by defendant under the Uniform Commercial Code of Pennsylvania.

3. Plaintiffs also filed suit against defendant in the United States District Court for the Southern District of Mississippi at Civil Action No. J 85-0733(B) for damages due to defendant's negligence and violations as set forth in Restatement of Torts 2d, Sections 402A and 402B.

4. The United States District Court for the Southern District of Mississippi transferred the action at Civil Action No. J 85-0733 to this Court pursuant to Title 28 U.S.C.A. Section 1404(a). Said case now bears Civil Action No. 85-2725.

5. The efficient administration of the aforesaid two actions, as well as the interests of all parties, would be better served by consolidating the two actions.

6. The within actions are related cases, involve common questions of law and fact, and grow out of the same transactions. Consolidation would work no prejudice to defendant.

WHEREFORE, it is respectfully requested that this Honorable Court consolidate the above cases for trial pursuant to Fed.R.C.P. 42(a).

FINKEL LEFKOWITZ OSTROW &
WOOLRIDGE

/s/ Stanley V. Ostrow

/s/ William A. Penrod
Attorneys for Plaintiffs
800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670

[Notice, certificate of service, and proposed order omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs, vs. DEERE & COMPANY, Defendant.	Civil Action No. 85-1534
ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs, vs. JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	Civil Action No. 85-2725

ORDER OF COURT

AND NOW, to-wit, this 21st day of November, 1985, in consideration of the within Motion, it is hereby ORDERED that the action of Albert Ferens, et ux v. John Deere Company a/k/a Deere & Company at Civil Action No. 85-2725 be, and hereby is, consolidated with Albert Ferens, et ux v. Deere & Company at Civil Action No. 85-1534 for all purposes.

/s/ Maurice B. Cohill, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife,	)	
Plaintiffs,	)	
-vs-	)	C.A. No. 85-2725
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY	)	
Defendant.	)	

DEERE & COMPANY'S MOTION FOR SUMMARY JUDGMENT

Deere & Company moves this Honorable Court to enter summary judgment in its favor in the within action for the following reasons:

1. This action arises from an accident which occurred on or about July 5, 1982 while Albert Ferens was cleaning a combine manufactured by defendant. (Complaint, ¶5 and ¶7)

2. This action was filed on July 23, 1985 in the United States District Court for the Southern District of Mississippi.

3. This action was subsequently transferred to the United States District for the Western District of Pennsylvania under 42 U.S.C. § 1404(a) pursuant to Plaintiffs' Motion for Change of Venue.

4. On plaintiffs' motion this action has been consolidated with another action between the same parties which is pending in the United States District Court for the Western District of Pennsylvania at C. A. No. 85-1534.

5. Plaintiffs reside in Dunbar, Fayette County, Pennsylvania. (Complaint, ¶1; Plaintiffs' Motion for Change of Venue, ¶1)

6. The combine which is the subject of this action was purchased by plaintiff from Uniontown Farm Equipment Company. (Complaint, ¶6)

7. The basis of the action pending at at C. A. No. 85-1534 "arises out of the same facts and circumstances upon which the [present] action is based; namely, plaintiff's loss of his hand in the operation of a John Deere Sidehill Combine on or about July 5, 1982, on husband-plaintiff's farm in Pennsylvania". (Plaintiffs' Motion for Change of Venue, ¶5)

8. Plaintiffs' claim does not arise out of or have any connection with any acts by the plaintiffs or defendant or any facts or circumstances arising in the State of Mississippi or the United States District Court for the Southern District of Mississippi. (Plaintiffs' Motion for Change of Venue, ¶2)

9. This Court's jurisdiction over both the present action and the action at C. A. No. 85-1534 is premised on diversity of citizenship in accordance with 28 U.S.C. § 1332.

10. Under Pennsylvania law Pennsylvania plaintiffs' action would be time-barred by 42 Pa. C.S. § 5524 unless commenced on or before July 5, 1984.

11. The filing of this action in the United States District Court for the Southern District of Mississippi was a subterfuge designed to evade the time bar imposed by 42 Pa. C.S. § 5524.

12. For the reasons set forth more fully in the brief to be filed in support of this motion, this Court may and should apply 42 Pa. C.S. § 5524 to the present action.

13. If 42 Pa C.S. § 5524 is applied to the present action, then defendant is entitled to summary judgment as a matter of law.

WHEREFORE, John Deere Company a/k/a/ Deere & Company moves this Honorable Court to enter judgment in its favor against plaintiffs, and to dismiss the present action with prejudice.

SHARLOCK, REPCHECK & MAHLER

BY: /s/ Gary F. Sharlock
Attorneys for Defendant.

[Certificate of service and proposed order omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 85-1534
DEERE & COMPANY, Defendant.	)	

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 85-2725
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	)	

ORDER

AND NOW, to-wit, this 25th day of July, 1986, having carefully considered the allegations in the Complaints in the light most favorable to the Plaintiffs and in accordance with the accompanying Opinion, it is hereby ORDERED, ADJUDGED and DECREED that:

1) Defendant's Motion for Summary Judgment be and hereby is DENIED with respect to the claims brought by C.A. 85-1534;

2) Defendant's Motion for Summary Judgment be and hereby is GRANTED with respect to the claims brought at C.A. 85-2725.

/s/ Maurice B. Cohill, Jr.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs, vs. DEERE & COMPANY, Defendant,	CIVIL ACTION NO. 85-1534
ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs, vs. JOHN DEERE COMPANY a/k/a DEERE & COMPANY, Defendant.	CIVIL ACTION NO. 85-2725

MOTION FOR CERTIFICATION AND FINAL JUDGMENT UPON LESS THAN ALL CLAIMS PURSUANT TO RULE 54(b) AND REQUEST FOR STAY OF FURTHER PROCEEDINGS AND EXTENSION OF TIME TO APPEAL

AND NOW, comes the plaintiffs, by their attorneys, Finkel Lefkowitz Ostrow & Woolridge, and file this Motion pursuant to F.R.C.P. 54(b) and seeks the court to enter a final judgment in favor of defendant upon the claims set forth at Civil Action No. 85-2725:

1. On July 3, 1985, plaintiffs filed C.A. 85-1534 in the Western District of Pennsylvania, basing their claim on breach of warranty under 13 Pa.C.S. § 1101-9507.

2. On July 25, 1985, plaintiff filed an action in the Southern District of Mississippi, basing their claim on

negligence, strict liability under Restatement Second of Tort § 402 A and B.

3. On November 8, 1985, upon plaintiffs' motion, the Court in the Southern District of Mississippi transferred the case to the Western District of Pennsylvania, where it was designated C.A. 85-2725.

4. By Order of Court dated November 21, 1985, the two actions were consolidated for all purposes.

5. On or about February 17, 1986, pursuant to Rule 56(c) defendant moved for summary judgment against all claims on the grounds that in C.A. 85-1534 the purchase order disclaimed any implied warranties of merchantability and fitness for a particular purpose and contained an exclusion of consequential damages; and plaintiffs' claim at C.A. 85-2725 for negligence and strict liability were barred by the Pennsylvania Statute of Limitation.

6. On July 25, 1985, this Court entered an order denying defendants' Motion for Summary Judgment with respect to the claims of breach of warranty and granting the Motion for Summary Judgment with respect to the claims of negligence and strict liability.

7. Plaintiff requests certification of this Courts July 25, 1985 order on the grounds that no just cause exists for delaying the entry of judgment at C.A. 85-2725.

8. Plaintiffs will suffer hardship and injustice through delay which may prohibit them from bringing an action against defendant in an appropriate forum, which would be alleviated by an immediate appeal.

9. The appellate court would not be obliged to consider the same issue a second time.

10. The need for review of the within appeal would not be mooted by future developments in the District Court on the pending claim at C.A. 85-1534.

11. No claim or counterclaim exists which could result in a setoff against the judgment sought to be made final.

12. Defendant would not be prejudiced by an appeal.

13. The trial court could be obliged to consider the same facts, testimony and issues a second time if plaintiffs succeed on appeal at the conclusion of action on the undismissed claim.

14. In order to protect plaintiffs' rights of appeal, the certification should include an extension of time to appeal wherein plaintiffs have thirty (30) days from the order certifying said judgment to appeal said judgment.

15. A stay of further proceedings of the breach of warranty action would, in event of favorable disposition of plaintiffs' appeal on the negligence and strict liability action, permit judicial economy in that both actions would thereafter be tried together.

WHEREFORE, plaintiffs request certification of the July 25, 1985 order and entry of final judgment on C.A. 85-2725.

FINKEL LEFKOWITZ OSTROW &
WOOLRIDGE

/s/ Stanley V. Ostrow

/s/ William A. Penrod
Attorneys for Plaintiffs

800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670

[Certificate of service and proposed order omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
vs.	)	Civil Action No. 85-1534
DEERE & COMPANY, Defendant.	)	
ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
vs.	)	Civil Action No. 85-2725
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	)	

PROPOSED ORDER OF COURT

AND NOW, to-wit, this 5th day of September, 1986, in consideration of the within Motion, it is hereby ORDERED that

1. This Court expressly determines that as to the Summary Judgment at C.A. 85-2725, there is no just reason for delay, and therefore entry of final judgment is directed.

2. An extension of thirty (30) days is hereby granted to plaintiffs to file an appeal on the within final judgment.

3. A stay of further proceedings is granted upon C.A. 85-1534 until such time as the issue on appeal is resolved.

BY THE COURT

/s/ Maurice B. Cohill, Jr. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife,
Plaintiffs,
vs.
DEERE & COMPANY,
Defendant.
) Civil Action No. 85-1534

ALBERT J. FERENS and MARGARET L. FERENS, his wife,
Plaintiffs,
vs.
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY,
Defendant.
) Civil Action No. 85-2725

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FROM JUDGMENT AND ORDER OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Notice is hereby given that Albert J. Ferens, and Margaret L. Ferens, his wife, Plaintiffs, above named, hereby appeal to the United States Court of Appeals for the Third Circuit from the Summary Judgment with respect to the claims brought at C.A. 85-2725, final judgment thereon having been entered by Order dated September 5, 1986.

FINKEL LEFKOWITZ OSTROW &
WOOLRIDGE

/s/ Stanley V. Ostrow

DATE: October 2, 1986 /s/ William A. Penrod

Attorneys for Plaintiff

800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670